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Reexamining the Gender Implications of Campaign Finance Reform: How Higher Ceilings on Individual Donations Disproportionately Impact Female Candidates

REEXAMINING THE GENDER IMPLICATIONS OF CAMPAIGN FINANCE REFORM: HOW HIGHER CEILINGS ON INDIVIDUAL DONATIONS DISPROPORTIONATELY IMPACT FEMALE CANDIDATES

By Ashley Baker*

The Bipartisan Campaign Reform Act (“BCRA”), signed by the President and enacted into law on March 27, 2002, capped a seven-year effort by its Congressional sponsors to change federal campaign law and marked the most significant amendment to the Federal Election Campaign Act (“FECA”) in more than a quarter-century. BCRA’s two pillars are its prohibition on the raising and spending of “soft money” by federal officeholders and candidates and its redefinition of what constitutes a campaign advertisement. Proponents of BCRA lauded its potential to address the corruptive effects of money in politics while opponents of BCRA decried its impact on the First Amendment rights of candidates and their contributors.

Reform legislation focused solely on corruption ignores the reality that exploding campaign costs and obstacles to effective fundraising by female candidates create severe barriers to political participation. While corruption is a valid concern, the effects of campaign finance legislation are no less insidious. One need only glance at the composition of the 109th U.S. Senate to find them: one African American, two Pacific Islanders, three Latinos, 14 women and 80 White American men.¹ Consequently, assuming *a priori* that the government may impose reasonable restrictions on the fundraising ability of candidates,² this Article seeks to develop an equal protection analysis of campaign finance reform by considering the effects of BCRA on minority, particularly female, candidates for the Senate.

The first part of this article develops the theoretical underpinnings of the argument that campaign finance law impairs the equal protection rights of female candidates. I briefly consider the historical application of equal protection law in the arena of elections and political campaigns and then situate campaign finance within that jurisprudence. Second, this essay offers empirical evidence demonstrating both the gendered component to candidate fundraising in U.S. Senate elections and the extent to which campaign finance laws, exemplified by § 307 of BCRA which increased individual contribution limits from \$1,000 to \$2,000,³ affect the relative ability of men and women to fundraise and campaign successfully. Third, I combine this data with the theoretical arguments of the first section to articulate my central argument - campaign finance regulations, as exem-

plified by § 307, operate in conjunction with gender disparities in a fundraising capacity to impair the relative ability of women to run for office. Finally, this article considers the legislative application of this argument.

DO SECTION 307 VIOLATE EQUAL PROTECTION?

The Supreme Court has affirmed both the right to equal participation of all voters and the right to a results-oriented determination of whether this right has been infringed.⁴ In recent decades, campaign finance has emerged as the new battleground in the struggle for equality in the political arena. Most discussions of campaign finance discrimination have focused on the individual level of the citizen voter or contributor.⁵ However, the campaign finance system is also suspect from the candidates’ perspective to the extent that it impairs a candidate’s abil-

ity to run, successfully, for office. The Court has consistently afforded protection of the absolute right of candidates to pursue elective office. Support for this right generally derives from the First Amendment and judicial recognition that running for office is a political activity vital to political advocacy and expression. However, courts have also recognized that restrictions on political participation implicate a candidate’s rights under

the Fourteenth Amendment.⁶

In particular, the Court has consistently recognized and expressed hostility to economic discrimination against political candidates. In *Bullock v. Carter*, the Supreme Court invalidated, on equal protection grounds, a primary election filing fee that required candidates to pay upwards of \$6,000 to gain access to the ballot.⁷ The Court held that economic discrimination is an unconstitutional barrier to political participation because it “substantially limits” the voter’s choice of candidates.⁸ Similarly, in *Lubin v. Panish*, the Court held that California could not deprive an indigent citizen the right to run for office because of his inability to pay a filing fee.⁹ Therefore, both *Bullock* and *Lubin* illustrate the theoretical underpinnings of an argument that declares financial barriers unconstitutional in the political system which effectively can exclude candidates from running for office.

Although under-funded candidates are not legally excluded from participation, the centrality of money to modern campaigns

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excludes them in practice. In the wake of *Buckley*, the costs of running for office at all political levels have exponentially increased. Total receipts in Congressional campaigns rose from \$194.8 million in 1978 to \$1.185 billion in 2004.¹⁰ Candidates seeking office, particularly in statewide campaigns, require vast sums of money to purchase television and radio advertising, support door-to-door canvassing efforts, and otherwise connect with the voting public. Campaign fundraising is highly correlated with electoral success, and it is in general, universally accepted that candidate expenditures affect electoral outcomes.¹¹ Candidates who win, raise and spend more money than candidates who lose. In 2000, for example, the average Senate candidate spent \$2.345 million while the average winning Senate candidate spent \$7.589 million.¹² Although the relationship between spending and electoral success is not perfectly linear, the correlation is striking.

To the extent that insufficient fundraising constructively impairs the ability of candidates from a protected group to compete for elected office, campaign finance laws may present an equal protection dimension. Yet, at first glance, the immense centrality of money to electoral victory seems unaffected by BCRA. In 2000 Senate candidates spent a total of \$437 million¹³ and in 2004 they spent \$488 million.¹⁴ However, to identify the equal protection impact of campaign finance reform, one must look beyond campaign finance totals to a gendered analysis.

EMPIRICAL SHOWING OF THE GENDER DIMENSION OF CAMPAIGN FINANCE

Female candidates for the U.S. Senate crystallize both the different fundraising capacities of candidates and the electoral consequences of this fundraising dynamic. Even though women have been historically underrepresented as both Senators and candidates, their numbers in recent years are sufficient for statistical analysis. To the extent that the following data reveals the disproportionate impact of BCRA on women, existing campaign finance law also impairs the constitutional, political rights of female candidates.

Campaign fundraising posed a significant obstacle to female candidates after the 1970s, when women first began running for Congress in significant numbers.¹⁵ However, subsequent election cycles show a trend of steady improvement in the ability of female candidates to fundraise successfully. A turning point in the electoral experience of female candidates culminated in the 1992 election with a breakthrough in their ability to receive financial campaign contributions. In 1992, women contested 11 races for Senate seats and emerged victorious in five, tripling their representation in the Senate. During these campaigns,

women raised record sums of money, even topping their male opponents in the second quarter.¹⁶ Female candidates raised more money than men with similar backgrounds and 60% of their contributions came from small, direct-mail donations from women.¹⁷ Many of the patterns of campaigning and fundraising developed then, in 1992, carried into the next decade.

Carole Jean Uhlaner and Kay Lehman Schlozman's 1986 study, *Candidate Gender and Congressional Campaign Receipts*, is one of the few systematic efforts to analyze competing theories of why women are perceived to be at a disadvantage in fundraising when compared to their male counterparts.¹⁸ Uhlaner and Schlozman examined whether gender had an independent effect on campaign finance. In conducting their analysis, they factored in gender with other variables, such as incumbency status, contested election, party, opponents' receipts, prior experience, and vote-share in the previous election.¹⁹ They concluded the relationship between gender and campaign finance was not statistically significant; rather, the most relevant predictor of a candidate's receipts was their status as challengers.²⁰ Since this 1986 study, data and literature by other authors have supported Uhlaner and Schlozman's theory.²¹ Factors other than gender are offered such as support from political action committees ("PACs"), to account for the disparity in fundraising.²²

However, as discussed later, this analysis shows that these authors have incorrectly concluded that gender has no significant effect on campaign finance. When fundraising is disaggregated to consider the sources and amounts given to women, a clear difference emerges in the capacity of women to raise money from PACs and to collect large individual contributions. Similarly, when women are further differentiated into successful and unsuccessful candidates, women who win have demonstrably more money than either other female candidates or their victorious male counterparts.

Before I turn to my findings, a brief word is needed on

When fundraising is disaggregated to consider the sources and amounts given to women, a clear difference emerges in the capacity of women to raise money from PACs and to collect large individual contributions.

my methodology and the limits it presents for this study. The study concerns the elections of 1998, 2000, 2002, and 2004. Data was collected from the Federal Election Commission and The Center for Responsive Politics²³ and analyzes receipts collected by all major party candidates during this six-year finance period. Each candidate's spending has been broken down into individual contributions and non-party contributions. These categories have been calculated as a percent of the candidate's total receipts in

an effort to control for spending disparities between different states. Therefore, the variable considered throughout this paper is the percent of total money received from the source in question. Each percentage is then further considered with respect to gender within the various categories of party, result, and candidate status. To control for lopsided races and the propensity of

women to run as sacrificial candidates in such races, the analysis discounts all candidates who failed to garner 35% of the final vote.

Analysis of the four election cycles raises several baseline claims about the fundraising conducted by female candidates for the U.S. Senate. As a whole, these propositions remain true whether such fundraising was conducted under FECA or BCRA.

INDIVIDUAL CONTRIBUTIONS COMPROMISE A GREATER PERCENTAGE OF TOTAL CAMPAIGN RECEIPTS FOR WOMEN THAN FOR MEN

Individual contributions overwhelmingly comprise the most important source of financing for all candidates.²⁴ In elections conducted under FECA (1998, 2000, and 2002), women collected 71.34% of their contributions from individual donors and 16.51% from PACs. In 2004, under BCRA limits, women collected 73.13% from individual donations and 20.38% from PACs. In contrast, men collected 61.32% of their contributions in 1998, 2000, and 2002 from individual donors; 68.72% of their total funds came from individual donors in 2004.²⁵

This proposition holds true in all categories of analysis — party, candidate status, and race outcome — and is particularly significant in open-seat and challenger races where female candidates are historically most likely to be concentrated. Compared to men, the average female candidate in these four election cycles raised 7.22% more of their financing from individual donors. Incumbent female candidates raised just 5% more of their finances from individual donors than incumbent males while women running as challengers and for open seats raised over 12% more of their finances from individual contributors than their male counterparts raised.

FEMALE CANDIDATES COLLECT THESE INDIVIDUAL CONTRIBUTIONS IN SMALLER DENOMINATIONS THAN MALE CANDIDATES

Women and men raise individual contributions in different amounts and from different sources. The vast majority of large donors to political campaigns are men.²⁶ Female candidates as a whole depend particularly upon female donors for financial viability and win monetary support from men only as their odds of election increase near to certainty.²⁷ Moreover, the average size of individual donations to most female candidates continues to be smaller than the average donation to male candidates. For example, female non-incumbents received 1/4 of all individual contributions in amounts less than \$200 whereas men received about 1/5 of their contributions in these smaller denominations.²⁸ There are several possible explanations for this discrepancy, ranging from a purported psychological barrier, rooted in historic sex-role patterns, against women asking for large sums

of money; to direct discrimination against female candidates; to continuing underrepresentation in the professional and social networks that serve as major sources of campaign contributions.²⁹ Ultimately, however, the relevant point is that female candidates' tendencies both to depend more heavily than male candidates on individual contributions and to receive smaller contributions ensure that female candidates must attract far greater numbers of individual contributors than their male counterparts just to equalize the total monetary value of their contributions.

WOMEN NEED MORE MONEY THAN MEN TO BE SUCCESSFUL CANDIDATES

Equalization of contribution totals may not even be sufficient to equalize the electoral outcomes or opportunities of male and female candidates. Analysis of aggregate levels of fundraising demonstrates noticeable differences in the finances necessary for female candidates to run successful campaigns. These differences exist in the amount of money necessary to reach the 35% threshold of campaign viability considered in this essay and the amount of money necessary to win a Senate seat. Con-

sidering all four electoral cycles, women reaching this 35% mark, on average, collected about \$7.6 million — or \$5 million more than male candidates.

Additionally, while women who win raise significantly more money than women who lose, male winners collect only marginally more money than their losing counterparts. The difference between male winners and losers is only about \$300,000. In contrast, female winners and losers are

separated by \$5.1 million, a particularly striking discrepancy considering that candidates failing to collect at least 35% of the final vote have already been excluded from this analysis. Thus, for women, \$5 million is the price of the mere 15%-point difference between winning and losing.

EFFECTS OF BCRA

By simply increasing the individual contribution limit from \$1,000 to \$2,000, §307 of BCRA, in effect, exacerbated the female candidates' disadvantage in each of the three aforementioned facets of gender-specific fundraising. Simultaneously, BCRA enhanced the fundraising capacities of male candidates who have always had a greater ability to collect the maximum contribution. Therefore, male candidates' greater ability to collect maximum contributions doubled in magnitude under BCRA.

Since the enactment of §307, both male and female candidate individual contributions (understood as a percentage of their total funding) have increased, but individual contributions to male candidates has increased significantly more. In 2004,

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while female candidates experienced less than a percentage-point increase in individual contributions, male candidates received an eight point jump.³⁰ Male incumbents and candidates who won their races experienced a particularly significant jump in individual contributions, with male incumbents gaining nearly 5% in individual contributions and winning male candidates gaining nearly 8%. Meanwhile, female candidates in corresponding categories either experienced no change or actual decline in their relative individual contributions.³¹ Effectively, the bump from \$1,000 to \$2,000 has boosted the individual contributions of candidates most capable of receiving maximum contributions – such as incumbents, probable winners and male candidates in general.

Ultimately, BCRA favored male candidates by increasing their individual, and overall, contributions and failing to affect a corollary benefit on the fundraising of female candidates. Prior to the enactment of BCRA, female candidates averaged \$7.33 million in total receipts to male candidates' \$6.34 million. After BCRA, female and male candidates averaged \$7.97 million and \$7.93 million, respectively. This phenomenon affected women regardless of candidate status. Incumbent female candidates, who had previously enjoyed a \$3.4 million advantage over male candidates, saw their edge drop by \$2 million in 2004.³² Female challengers were affected even more severely as their total receipts declined by more than 1/3, from just over \$3 million pre-BCRA to \$1.9 million in 2004.³³ In contrast, male challengers increased their receipts from \$5.5 million to \$6.2 million, thereby raising, on average, over 200% more money than female challengers.³⁴ On the whole, because women start out severely underrepresented and have a high propensity to run as challengers, the prospect that female challengers cannot fundraise as effectively as male candidates cast grave implications towards the representation of women in the Senate.

CANALIZING BCRA'S DISCRIMINATORY IMPACT ON WOMEN'S POLITICAL PARTICIPATION

Unquestionably, BCRA is a facially neutral law. Moreover, this analysis reveals that BCRA established financial parity between candidates of different genders insofar as women had enjoyed, in the aggregate, a fundraising advantage over men prior to BCRA's enactment. However, with respect to the legal rights affected by BCRA, the relevant consideration is the degree of effective political participation, enjoyed through the act of running for office that candidates of different genders were able to exercise by virtue of money raised. Money engenders successful candidacy; particularly at the Senate level, fundraising is crucial to launching a legitimate and successful campaign.³⁵ Female candidates, as demonstrated above, require more money than men to reach the thresholds of both campaign

viability and electoral success. Thus, the decline in the female candidates' fundraising advantage should be interpreted as a decline in their ability to participate in the electoral process.

It must be noted that in neither the pre- nor the post-BCRA periods did female candidates achieve comparable success rates to male candidates. Taking the number of female

winners as a percent of the total number of successful candidates, women were successful in the past four election cycles 13.6% of the time on average.³⁶ In 2004, the proportion of successful female candidates did not significantly differ from the three prior cycles; however, this fact is likely due primarily to the high number of incumbent women running and winning in 2004 and should not be taken as evidence that BCRA did not affect the success rates of female candidates. In

fact, the absence of success by open-seat and challenger candidates in 2004 is strikingly below the historical success rate for such candidates, which is about 45% and 5% respectively.³⁷

Courts have considered equal-protection challenges to campaign finance laws premised on the discriminatory effects of campaign finance regulations on political challengers. While previous claims are not completely analogous to those of female candidates, they are instructive in articulating a theory of harm and in understanding the courts' receptiveness to the gendered claims raised in this article. The case study presented in this article is strengthened to the extent that women are an identifiable class to whom the Court has consistently afforded protection under the equal protection clause.

In addition to their First Amendment challenges, the *Buckley* appellants argued that contribution limitations resulted in invidious discrimination between incumbents and challengers because challengers needed large sums of money to overcome the disadvantages of lesser name recognition.³⁸ The Court rejected this claim largely on grounds that there was insufficient evidence to support it, but, significantly, it did not reject the theory itself.³⁹ The Court held that, because there was no evidence that incumbents would benefit more, and because the danger of corruption is equal among challengers and incumbents, Congress had justifiably put fundraising constraints on both classes. Still, the Court explained that, even though the law appeared evenhanded on its face, "[t]he appearance of fairness... may not reflect political reality."⁴⁰

Likewise, the plaintiffs in *McConnell v. Federal Election Commission* made a similar claim that contribution limits discriminated against challengers. The Court dismissed the plaintiff's claim for lack of standing, specifically, for the plaintiff's inability to show that the alleged injury was fairly traceable to § 307 of BCRA.⁴¹ However, the Court remained divided on the viability of the theory itself. As Justice Scalia's biting dissent stated, "[T]o be sure, the legislation is evenhanded....[b]ut as

everyone knows, this is an area in which evenhandedness is not fairness. If all electioneering were evenhandedly prohibited, incumbents would have an enormous advantage.”⁴²

Two federal district court cases further develop this theory. In *Minnesota Citizens Concerned for Life v. Kelley*, a pro-life candidate alleged that a year-based limit on contributions discriminated against challengers because they generally entered a race late in an election cycle whereas incumbents were able to raise money throughout their terms.⁴³ The court concluded here that it had no basis on which to find that the year-based limit discriminated against challengers as a class; thus, the plaintiff had failed to carry his burden.⁴⁴

Additionally, *Driver v. Distefano* considered a challenge to a Rhode Island statute limiting political contributions to \$1,000, which the plaintiff argued violated the Fourteenth Amendment by impermissibly discriminating against challengers in favor of incumbents.⁴⁵ In expressing at least a theoretical receptiveness to the argument, the court went so far as to posit a two-part test for its analysis: first, the court must determine whether the statute employs evenhanded language and is therefore evenhanded on its face; then, if it is facially evenhanded, the court must determine whether a discriminatory effect exists in practice.⁴⁶ Ultimately, the court’s decision rests on a rejection of the second part of this test in which the court did not believe that the statute in fact discriminated against challengers. The court noted that the available evidence contradicted the plaintiff’s claim that challengers could catch up with incumbents by raising more money from contributions in excess of \$1,000 than incumbents could.⁴⁷ Therefore, as in *Mississippi, Buckley*, and *McConnell*, the court here accepted the legal theory but found that the plaintiff presented insufficient evidence to carry his burden of proving discriminatory effect.

Empirical support for the proposition that BCRA limits disadvantaged female candidates corrects the shortcomings of these prior attempts to strike down contribution limits on equal protection grounds. Additionally, this claim corrects a further weakness in prior formulations – the availability of political participation is inequitable in regards to poorly funded candidates in general, and to female candidates in particular. Although it remains

doubtful that the Court will recognize a fundamental right to wage equally effective campaigns for elective office,⁴⁸ the Court is inherently more receptive to claims of discrimination levied by women by virtue of their nature as a suspect class.

A PROPOSAL FOR QUALITY IN CAMPAIGN FINANCE REFORM

Given the Court’s baseline recognition of a candidate’s fundamental right to participate in the political process, the empirical showing that immutable characteristics, consistently recognized as mandating particular scrutiny under the Equal Protection Clause, correlate with disproportionate fundraising disadvantages highlight the extent to which current campaign finance laws violate that right.⁴⁹

The remedies for this particular campaign finance dilemma are different from many of the legislative proposals advocated by campaign finance reformers because many of those remedies focus on corruption and free-speech debates. Recognizing that a finance scheme that facially awards female candidates more money than male candidates would be politically and

constitutionally untenable, I propose that the best remedy would be a cap on political contributions at the amount that all candidates are equally capable of collecting. Neither the current level nor the pre-BCRA limit is acceptable in terms of ensuring equal political participation. While further research is needed to determine this limit in precise dollars, drastically reducing the maximum contribution would simultaneously equalize the fundraising capacity of all candidates and cause

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aggregate campaign receipts to correlate much more closely with the extent of each candidate’s base support.

This statistical showing of the discriminatory effects of current campaign finance structures exposes the need to expand the campaign finance debate to include assurances that regulations, like other laws governing electoral participation, operate consistently with the equal protection requirements of the Fifth and Fourteenth Amendments and recognize the rights of candidates to enjoy equal opportunity to participate in the political process.

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¹ "Senators of the 109th Congress" directory, available at http://www.senate.gov/general/contact_information/senators_cfm.cfm.

² E.g., Buckley v. Valeo, 424 U.S. 1 (1976) (holding that individual and political committee contribution limits were justified by the weighty interests in restricting influences stemming from the dependence of candidates on large campaign contributions).

³ Bipartisan Campaign Reform Act, 2 USC §431 note (2002). "SEC. 307. MODIFICATION OF CONTRIBUTION LIMITS, (a) Increase in Individual Limits for Certain Contributions.-- Section 315(a)(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(1)) is amended-- (1) in subparagraph (A), by striking '\$1,000' and inserting '\$2,000'; and (2) in subparagraph (B), by striking '\$20,000' and inserting '\$25,000.'"

⁴ See Reynolds v. Sims, 377 U.S. 553, 566 (1964) (holding that "the Equal Protection Clause guarantees the opportunity for equal participation by all voters"); See also Fortson v. Dorsey, 379 U.S. 433 (1965) (stating that a vote dilution claim can rest on either discriminatory purpose or effect).

⁵ See, e.g., Debra Lyn Bassett, *The Politics of the Rural Vote*, 35 AZLJ 743 (2003) (concluding that political contributions, which serve to shape the political agenda, underrepresent the interests and political voice of rural dwellers); Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YLLPR 273, 277 (1993) (arguing that the wealth primary, whereby wealthy contributors preselect almost all candidates, and the financial advantage enjoyed by incumbents result in a "tyranny of private money [that] corrupts the democratic relationship of one person/one vote by making it exceedingly difficult for poor or middle-class persons to run for office, by leaving them without meaningful electoral choices, and by assuring that wealthy interests will set the parameters of political debate and the nature of the legislative agenda.").

⁶ See Piece v. Allegheny County Board of Elections, 324 F.Supp.2d 684, 694 (W.D.Pa. 2003) ("Where a state, however, employs restrictions on the ability of a candidate to run for public office, constitutional provisions of general application, such as the First and Fourteenth Amendments may be violated. For example, where a state restricts the ability of a candidate or political party to be placed on state ballots, the First Amendment right to freedom of association and the Fourteenth Amendment right to equal protection under the law may be infringed."); see also William v. Rhodes, 393 U.S. 23 (1968), Caudell v. City of Toccoa, 153 F.Supp.2d 1371 (2001), Hunt v. City of Longview, 932 F.Supp.828 (1995), Clements v. Fashing, 457 U.S. 957 (1982).

⁷ Bullock, 405 U.S.134, 144 (1972).

⁸ *Id.*

⁹ Lubin, 415 U.S. 709, 710 (1974).

¹⁰ The Center for Responsive Politics, a non-partisan, non-profit research group based in Washington, D.C. that tracks money in politics, and its effect on elections and public policy, available at <http://www.opensecrets.org/> [hereinafter, *OpenSecrets.org*].

¹¹ See, e.g., Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, American Political Science Review 1978, 469-491; Donald Philip Green and Jonathan S. Krasno, *Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections*, American Journal of Political Science 1988, 884-907; Randall W. Partin, *Assessing the Impact of Campaign Spending in Governors' Races*, Political Research Quarterly March 2002, 213-33; Alan Gerber, *Estimating the Effect of Campaign Spending on Senate Outcomes Using Instrumental Variables*, American Political Science Review June 1998, 401-411.

¹² *OpenSecrets.org*, supra note 10, at The Big Picture, 2000 Cycle, The Price of Admission, <http://www.opensecrets.org/bigpicture/stats.asp?cycle=2000>.

¹³ Federal Election Commission Summary Data, available at http://www.fec.gov/press/press2000/press_2000.shtml.

¹⁴ *OpenSecrets.org*, supra note 10.

¹⁵ SUSAN J. CARROLL, WOMEN AS CANDIDATES IN AMERICAN POLITICS 52 (2nd ed., Indiana University Press 1994); see also RICHARD LOGAN FOX, GENDER DYNAMICS IN CONGRESSIONAL ELECTIONS 112 (Sage Publications 1997).

¹⁶ Chris Black, *Women, with Help from Women, Fill Campaign Coffers*, THE BOSTON GLOBE, Aug 10, 1992.

¹⁷ Clyde Wilcox, *Why Was 1992 the 'Year of the Woman'? Explaining Women's Gains in 1992*, in THE YEAR OF THE WOMAN: MYTHS AND REALITIES, 10 (Elizabeth Adell Cook et al. eds., 1994).

¹⁸ Carole Jean Uhlaner and Kay Lehman Schlozman, *Candidate Gender and Congressional Campaign Receipts*, 48, J. POLITICS 30-50 (Feb 1986).

¹⁹ *Id.* at 35.

²⁰ *Id.*

²¹ See generally RICHARD A. SELTZER, JODY NEWMAN AND MELISSA VOORHEES LEIGHTON, SEX AS A POLITICAL VARIABLE: WOMEN AS CANDIDATES AND VOTERS IN U.S. ELECTIONS (Lynne Rienner Publishers 1997).

²² See, e.g., Barbara C. Burrell, *Money and Women's Candidacy for Public Office*, in WOMEN AS CANDIDATES IN AMERICAN POLITICS (Susan Carroll ed., 1985).

²³ *OpenSecrets.org*, supra note 10 (providing accessible data regarding candidate spending in Congressional and Presidential elections). It is important to note that all of the calculations included in this analysis were compiled personally by the author

given raw data available on *OpenSecrets.org* and Federal Election Commission's website, <http://www.fec.gov>.

²⁴ Thomas Mann and Anthony Corrado, *The Flow of Money in Federal Elections*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK, Revised Draft (2002).

²⁵ *OpenSecrets.org*, supra note 10.

²⁶ Jason P. Conti, *The Money Chase: How Proposed Changes to Campaign Finance Laws Could Impact Female Candidates*, 21 B.C. THIRD WORLD L.J. 105, 115 (2001).

²⁷ Barbara C. Burrell, *Money and Women's Candidacy for Public Office*, in WOMEN AS CANDIDATES IN AMERICAN POLITICS, 77 (Susan Carroll ed., 1985).

²⁸ Kirsten la Cour Dabelko and Paul S. Hermson, *Women's and Men's Campaigns for the U.S. House of Representatives*, 50, No. 1 POLITICAL RESEARCH QUARTERLY, 124 (1997).

²⁹ LINDA WITT, KAREN M. PAGET, AND GLENNA MATTHEWS, RUNNING AS A WOMAN: GENDER AND POWER IN AMERICAN POLITICS 133-4 (The Free Press 1994).

³⁰ *OpenSecrets.org*, supra note 10, available at <http://opensecrets.org/politicians/index.asp> (each candidate's campaign finance contribution information is published on his or her linked page).

³¹ *OpenSecrets.org*, supra note 10. Pre-BCRA, female incumbents received 68.7% of their contributions from individual donors; in 2004 they received 65.2%. Similarly, female winners experienced a decline in individual contributions from 67.5% to 65.2%.

³² *OpenSecrets.org*, supra note 10, (female incumbent collected \$9.67 million in 2004 while male challengers collected \$8.21 million).

³³ *OpenSecrets.org*, supra note 10.

³⁴ The change in open-seat candidates' receipts pre- and post-BCRA was negligible.

³⁵ See, e.g., JOHN THIELMANN AND AL WILHITE, DISCRIMINATION AND CONGRESSIONAL CAMPAIGN CONTRIBUTIONS 57 (1991) ("[U]nderfunded candidates are likely to be unsuccessful candidates.").

³⁶ In 1998 through 2004 respectively, four, six, three and five female candidates won office. Given that on average, 33 candidates were successful per cycle, women comprised 12, 18, 9 and 15% of the successful candidates in the given election.

³⁷ *OpenSecrets.org*, supra note 10, Center for American Women and Politics, Women Candidates for Congress 1974-2004 - Party and Seat Summary, available at http://www.camp.rutgers.edu/facts/canhistory/canwincong_histsum.pdf (last accessed 9/24/06). Of the 106 female candidates from a major party nominated to run for senate, 33 were successful (approximately 31.1%). 18 of these (85.7%) were incumbents, three were challengers (5.2%) and 12 (44.4%) were open-seat candidates.

³⁸ Buckley v. Valeo, 424 U.S. 1, 31-5 (1976).

³⁹ *Id.* at 35.

⁴⁰ *Id.* at 31.

⁴¹ McConnell v. Federal Election Commission, 540 U.S. 93, 230 (2003).

⁴² McConnell, 540 U.S. at 249.

⁴³ See Minnesota Citizens Concerned for Life, 291 F.Supp.2d 1052 (D. Minn., 2003).

⁴⁴ *Id.* at 1062 ("While 'permitting incumbents to insulate themselves from effective electoral challenge' might be among the host of 'constitutional evils' forbidden by the First Amendment; *id.* at 402, 120 S.Ct. 897 (Breyer, J., concurring), Racer has not provided evidence that such a scheme is at work here. Rather, he simply quotes from the Ninth Circuit's review of the District of California's factual findings regarding a California ballot proposition. In oral argument, counsel for Plaintiffs indicated that the Court could use its common sense to find that the year-based limit discriminates as a matter of law. The Supreme Court, however, has cautioned that "[a]bsent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." Racer has provided no such evidence here. "Accordingly, the Court has no basis on which it could find that the year-based limit discriminates against challengers as a class. The Court therefore finds that Racer has failed to carry his burden as to the year-based contribution limits.") (internal citations omitted).

⁴⁵ Evidence suggests that this argument is in fact incorrect; as the Buckley court noted, contribution limits help challengers by limiting the amount of money raised by incumbents who are able to fundraise in large denominations.

⁴⁶ Driver v. Distefano, 914 F. Supp. 797, 802 (D.R.I., 1996).

⁴⁷ *Id.*

⁴⁸ See Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 258 (1986) ("Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources."); Georgia v. Ashcroft, 539 U.S. 461 (2003) (the ability of a voter to actually elect a candidate of its choice is not dispositive in determining whether voters have enjoyed a right to cast a meaningfully effective vote) (emphasis added).

⁴⁹ The empirical evidence put forth in this paper supports this argument obviously only with respect to gender. While research cited herein suggests the applicability of my argument to racial and ethnic minorities, further research on this topic would bolster the imperative that courts fully consider the equal protection dimensions of any campaign finance scheme.